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No. 438

In the

Supreme Court of the United States

OCTOBER TERM, 1969

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

THOMAS M. HANNIGAN and
TRU-HAN CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The opinion of the Court of Appeals for the Seventh Circuit is reported at 410 F 2d 285 (7th Cir., 1969). A copy of that opinion is appended hereto.

THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

A. The judgment of the United States District Court was entered on April 11, 1968. The opinion and order of the Court of Appeals for the Seventh Circuit affirming the judgment were entered on April 15, 1969.

B. The Court of Appeals for the Seventh Circuit denied defendant's Petition for Rehearing on June 4, 1969.

C. Jurisdiction to review the judgment of the Court of Appeals is conferred by Title 28, Section 2101(c), United States Code.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Seventh Circuit Court of Appeals render a decision in conflict with a decision of this Court and of another court of appeals, decide an important state question in a way conflicting with applicable state law and so depart from the usual and accepted course of judicial proceedings as to call for the exercise of this Court's power of supervision when it twice consciously ignored, without comment, the uncontroverted evidence and body of law which required a holding that plaintiffs ratified the "coerced" contractual modification or amendment as a matter of law?

2. Did the Court of Appeals render a decision in conflict with a decision of this Court and another court of appeals, decide an important state question in a way conflicting with applicable state law and so depart from the usual and accepted course of judicial proceedings as to call for the exercise of this Court's power of supervision when it held that Petitioner had coerced the contractual modification or amendment?

3. Do federal courts have jurisdiction to determine the merits of plaintiffs' claim?

STATEMENT OF THE CASE

This action was filed on April 17, 1967. Plaintiffs alleged violations of Section 2(c) of the Clayton Act (15 USCA §13(c)), Section 2(f) of the Clayton Act (15 USCA §13(f)), Section 1 of the Sherman Act (15 USCA §1), and that Sears, in 1962, induced Fabricated Products, Inc. (hereafter "Fabricated") to breach a contract between Fabricated and plaintiff Thomas M. Hannigan (hereafter "Hannigan"). Jurisdiction over Counts I, II and III, the anti-trust claims, was invoked under the provisions of

15 USC §15. There is no diversity of citizenship between the parties. Federal jurisdiction over Counts IV and V, the inducement to breach counts, rests solely upon the theory of "pendent jurisdiction".

At the close of the plaintiffs' evidence, the trial court granted Petitioner's motion for a directed verdict as to all anti-trust counts. It denied its motions for a directed verdict as to Counts IV and V, the inducement to breach counts. The jury rendered a verdict for Plaintiffs in the amount of $30,000 actual and $90,000 punitive damages on those counts and judgment was entered upon the verdict on April 11, 1968. The judgment was affirmed by the Court of Appeals for the Seventh Circuit in an opinion entered April 15, 1969. On June 4, 1969, that court denied Sears' Petition for a Rehearing.

Petitioner is a New York corporation with its principal place of business in Illinois (9, 21)[1]. Plaintiff Hannigan, an attorney, is a citizen of Illinois (9, 19, 97) and the president and principal stockholder of plaintiff Tru-Han Corporation (hereafter "Tru-Han"), an Illinois corporation (98, 99, 100). In 1957, Tru-Han became a distributor of metal outdoor storage buildings then being manufactured by Fabricated (100). Fabricated also sold such buildings directly to Sears (49). Subsequently, on July 17, 1958, Hannigan and Fabricated entered into a written agreement (231) wherein Fabricated agreed to sell metal outdoor storage cabinets or lawn lockers, as distinguished from the buildings, exclusively to Hannigan. The lockers served the same purpose and were manufactured by the same process as the buildings (53). They differed from the buildings only in that they were smaller in dimension.

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[1] Numbers in parentheses refer to pages of Appendix in the Court of Appeals for the Seventh Circuit.

Following execution of this agreement and until shortly before March 9, 1964 (Fabricated then went into Bankruptcy), Fabricated sold the lockers to Tru-Han (52-55, 108). Tru-Han in turn sold them both at retail and to Montgomery Ward and Spiegels. Until late 1962, it also sold them to Sears (103).

Starting in December of 1961, Sears entered into written contracts with Products Engineering and Manufacturing Company (hereafter "Pemco") for the purchase of both buildings and lockers (249) but continued to make some purchases of lockers from Tru-Han and buildings from Fabricated. *At no time did Sears have contracts with either Tru-Han, Fabricated or Hannigan.* All of Sears' purchases from them were made on a spot basis. In June of 1962, John Mitchell became the Sears buyer of buildings and lockers (81). Pemco was not producing quantities sufficient to meet the needs of Sears (89) and Mitchell asked Fabricated to supply Sears with both buildings and lockers. He told Columbini, Fabricated's president, that he wished to purchase both the lockers and buildings from a single source, suggested to Columbini that he contact Hannigan to work it out and told him that if he was unable to work it out, he (Mitchell) would have to look further for a single source for the two products (192). Sears represented 60 per cent of Fabricated's business.

Columbini corroborated Mitchell's testimony. He further testified that after he spoke with Mitchell, he called Hannigan on the phone and told him that they had to make some agreement so that Fabricated could sell lockers directly to Sears or they stood a chance of losing both the locker and the building business (64-5). Both Columbini and Hannigan knew that Sears had placed orders with Pemco (59-61; 123-4). Columbini also testified

that he told Hannigan that he (Hannigan) had no choice but to make a deal with him (70), and that he and Hannigan agreed that Fabricated would thereafter sell lockers directly to Sears and pay Tru-Han a 10% commission on such sales (65, 67, 232). He also testified that, after his telephone discussion with Hannigan, he had his sales manager (Mr. Ross) write Hannigan a letter confirming the telephone deal (67-68). That letter is Plaintiffs' Exhibit 24 (232). Columbini further testified that Sears was notified of this new agreement with Hannigan (65, 66, 71, 72) and that Fabricated made no locker sales to Sears until after Hannigan had so agreed (67-68).

Hannigan testified that after the telephone conversation with Columbini, he *prepared and signed* an amendment to the original contract in which amendment it was agreed that Fabricated would sell lockers directly to Sears and pay a 10% commission to Hannigan on such sales (129-130). That amendment is Defendant's Exhibit 4. (252) Hannigan admitted that for one full year, he received copies of all invoices from Fabricated to Sears on sales of lockers, that he set up a commission account on Tru-Han's books where these invoices were recorded and from which the commissions to Tru-Han were computed at 10% of such sales and that *between December of 1962 and December of 1963, Fabricated paid Tru-Han commissions of $21,335 on sales of lockers to Sears amounting to $213,350* (113-4, 117, 125-6).

Hannigan also admitted that after Fabricated went into Bankruptcy, its Trustee filed suit against Tru-Han and Tru-Han filed a counterclaim in which it was *alleged that Tru-Han had not received from Fabricated all of the commissions due it on sales of lockers by Fabricated to Sears as required by the modified contract between Fabricated and Hannigan. Hannigan's amendment to the*

contract was a specific exhibit attached to and made a part of the counterclaim (251-254).

In the trial court and the Court of Appeals, Sears argued that, as a matter of law, the contract between Fabricated and Hannigan was not breached, but rather was modified, that Hannigan's agreement to modify the contract with Fabricated was not obtained by coercion and that, in any event, his acts subsequent to the modification, including the acceptance of benefits thereunder and the filing of a counterclaim based thereon, constituted ratification of the modification as a matter of law. In its Opinion, the Court of Appeals held that the modification of the July 17, 1958 agreement was coercively obtained by Sears. It completely ignored the evidence and law of ratification and the argument advanced with reference thereto. The Court's order of June 4, 1969, denying the Petition for Rehearing was entered without opinion.

ARGUMENT

I. By refusing to consider overwhelming and uncontroverted evidence that plaintiffs ratified the contractual modification or amendment, the Court of Appeals for the Seventh Circuit deprived Petitioner of a substantial and valid defense, rendered a decision in conflict with a decision of this Court, with the decisions of other courts of appeal, decided an important state question in a way conflicting with applicable state law and so departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

Assuming *arguendo* the correctness of the holding of the Court of Appeals that the contract between Hannigan and Fabricated was modified as a result of economic coercion, a point which Petitioner by no means concedes, the Court had before it, but completely ignored, uncontroverted and overwhelming evidence that the modification was ratified by the subsequent acts of Plaintiffs extending over a period of years and that their claim of coercion was therefore necessarily barred as a matter of law. The uncontroverted evidence of ratification and the applicable law were prominently set forth in Petitioner's Brief and, when the Court of Appeals failed to even comment upon this evidence and law in its Opinion, Petitioner filed a Petition for Rehearing, pointing out this most important omission. The Petition was denied without comment.

Petitioner submits that the obviously conscious refusal of the Court of Appeals to recognize that plaintiffs ratified the modification or even to comment upon this subject has resulted in a decision which conflicts in the

clearest sense with well-settled law as enunciated by this Court, by other Circuits and by the Courts of the State of Illinois. By completely ignoring ratification, the Court of Appeals has denied Petitioner a substantial defense available under the law and has so departed from the accepted and usual course of judicial proceedings that the exercise of this Court's power of supervision is required.

Cases are legion and uniform that an agreement made under coercion or duress is not void, but merely voidable, and that one who enters into such an agreement must promptly and unequivocally disavow his allegedly involuntary acts or ratification will be implied as a matter of law. (77 ALR 2d, 428-9). One of the leading cases to this effect is this Court's decision in *Barnette* v. *Wells Fargo Nevada National Bank,* 270 U.S. 438, 70 L. Ed. 669 (1925). There, plaintiff attempted to set aside a conveyance of real estate allegedly made under duress. She filed suit more than three years after the conveyance was made and approximately three years after the grantee had resold part of the property with her knowledge. The Court of Appeals reversed a trial court judgment for plaintiff and this Court, affirming the Court of Appeals, stated:

> "If there was duress here, appellant, as soon as she was relieved from its operation, was in a position either to disaffirm her conveyance or to allow it to stand undisturbed as the free and formal disposition of her rights. If her choice was to disaffirm, it might have been evidenced by suit timely brought or by any other action disclosing her purpose to those who would be affected. . . .
>
> "This unexplained delay of more than three years in exercising appellant's asserted right to disaffirm her conveyance, while the appellee and his predecessors were left in ignorance of her intention to assert

it, and her affirmative action as well, in recognizing the validity of her deed and the authority of the appellee under it, establish conclusively her election to allow her conveyance to stand as the unrevoked and effective agency for the disposition of her rights." (70 L. Ed. at pp. 674-5)

In *Gallon* v. *Lloyd-Thomas Company,* 264 F. 2d 821 (8th Cir., 1959), facts strikingly similar to those at bar were presented to the Court of Appeals for the Eighth Circuit. There, plaintiff agreed to a modification of his contract of employment calling for a lower salary than that which he had been receiving. He continued his employment for nine months after agreeing to the modification, voicing no objection thereto until after he left defendant's employ. He subsequently sued to rescind the modification on the ground that it had been obtained by duress and coercion. The trial court entered judgment N.O.V. for defendant. In affirming the trial court, the Eighth Circuit stated:

"Did plaintiff ratify the contract as a matter of law? Appellee insists that in view of plaintiff's actions and conduct, and his attitude toward the contract following its execution, the question must be answered in the affirmative. We agree. *Ratification results if the party who executed the contract under duress accepts the benefits flowing from it or remains silent or acquiesces in the contract for any considerable length of time after opportunity is afforded to annul or void it. . . .*

"Measured by the foregoing standard, the conclusion is inevitable that plaintiff ratified the contract in question. It appears without dispute that at the time the contract was signed [October 13, 1954], plaintiff was represented by an attorney. . . . From the time plaintiff signed the contract until he left defendant's employ in July, 1955, he never on a single occasion

> voiced any objection to the circumstances leading up to the contract nor did he at any time, after the alleged duress was removed, protest . . . that he had been pressured into signing the contract. To the contrary, he recognized the contract . . . He made weekly reports to defendant, in which he requested payment of his draw allowance of $175, which had been agreed upon." (264 F. 2d at pp. 825-6, Emphasis supplied)

Not only does the decision of the court below, silent on the point of ratification, conflict with applicable decisions of this Court and of the Eighth Circuit, it indeed conflicts with an earlier decision of the Seventh Circuit itself when that Circuit voiced itself on the subject and reversed the trial court. Thus, in *National City Bank of Chicago* v. *Wagner,* 216 Fed. 473 (7th Cir., 1914), plaintiff filed a petition to set aside certain conveyances of real estate on the grounds of duress, undue influence and lack of consideration. The trial court, finding that the conveyances had been procured through fraud, duress and undue influence, set them aside. On appeal, defendant argued that plaintiff had ratified the conveyances. In reversing the trial court, the Court of Appeals stated:

> If she [plaintiff] had desired to repudiate the former conveyances, she had, at that time, the fullest opportunity to do so. She might have conveyed the property and not merely her equity therein to the stockbrokers; she might have inserted in the document an express revocation of the former grants; she might have protested verbally against the alleged wrongs. Instead of this, however, she recited in the instrument itself the fact and purpose of the conveyances to the bank, and therein and thereby expressly authorized and directed the bank to pay over to Wagner & Co. only the balance remaining after the adjustment and satisfaction of its own claims. By clearest implication, if not by express words, she thereby evidenced

her intention to ratify the original conveyances to the bank. (216 Fed. at p. 478)

And in *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 245 F. Supp. 889 (N.D. Ill., 1965), the court stated:

> ". . . the party asserting the defense [economic coercion] must have promptly disavowed the involuntary act or acquiescence will be implied as a matter of law." (245 F. Supp. at p. 894)

Equally clear and important is the fact that the decision of the court below directly conflicts with the law of the State of Illinois. In *Bogue* v. *Franks*, 199 Ill. 411 (1902), plaintiff had attempted to set aside a note and deed of trust allegedly obtained under duress. The Illinois Supreme Court affirmed a lower court judgment for defendants, stating:

> The note and trust deed were delivered on the 2d day of February, 1895. No complaint was made that they were not in every respect valid and effectual until the amended answer was filed to the bill in the cause, on the 24th day of November, 1897, more than two years and eight months after the delivery of the note and mortgage. The appellants, during that interval, treated the debt and the trust deed as valid by paying interest on the indebtedness, by asking and obtaining extensions of time in which to make further payments of interest, and by asking and obtaining the benefit of the release of a portion of the premises described in the trust deed from the lien thereof. Even if obtained by duress, a deed or mortgage is not, in general, void, but only voidable, and may be ratified, and can only be avoided by prompt action on the part of the injured party after the restraint has been removed, and cannot be avoided if ratified after the

coercing influence has ceased to operate. (199 Ill. at pp. 418-419).

And, in *Joyce* v. *Year Investments, Inc.*, 45 Ill. App. 2d 310 (1st Dist., 1964), plaintiffs sued to avoid a settlement agreement allegedly entered under economic coercion. Affirming the trial court's dismissal of the complaint, the Illinois Appellate Court stated:

> *"In the case at bar . . . the plaintiffs choose to enter into an agreement with the defendants in which the defendants' allegedly arbitrary demands were met; but here the plaintiffs not only entered into the agreement, but accepted the benefits thereof. . . . We consider that the voluntary acceptance of benefits under the facts in this case is a bar. . . ."* (45 Ill. App. 2d at p. 315, emphasis supplied)

It is uncontroverted that the so-called "coercive" acts which caused Hannigan to agree to the modification culminated during July or August of 1962. Yet the record is completely void of one subsequent word of disavowal, objection or protest until this suit was filed, almost five years later, on April 17, 1967. Not only is the record void of any disavowal, it discloses affirmative acts of ratification. It discloses that after Hannigan agreed to the modification he received copies of all invoices from Fabricated to Sears covering sales of lockers, that he set up a commission account on Tru-Han's books in which the sales of lockers by Fabricated to Sears were recorded (237-48), and that from December of 1962 to December of 1963 (Fabricated went into bankruptcy in March of 1964), Tru-Han received and accepted $21,335 in commissions on such sales all paid pursuant to the terms of the modification (113-4, 117, 125).

In addition, even before March 9, 1964, when Fabricated went into Bankruptcy (47), a corporation owned by Hannigan purchased the locker factory from Fabricated (127). Obviously, Fabricated could then no longer sell to Sears or to plaintiffs. On November 25, 1964, more than eight months after Fabricated went into bankruptcy and more than two years after the "coercive" acts had terminated, plaintiffs recognized the validity of the modification by filing a counterclaim against Fabricated's Trustee claiming that Fabricated had not fully paid all of the commissions due on sales of lockers to Sears as required by the *modified* contract[2] (251-4). The amendment drafted and signed by Hannigan (252) was attached to and made a specific exhibit to the counterclaim and that counterclaim, filed by the same lawyers who have represented plaintiffs throughout this case, was based upon the very modification which the Court of Appeals has now held was obtained by coercion.

Thus, in addition to acquiescence by silence until this suit was filed almost five years after Hannigan agreed to the modification, in addition to the voluntary acceptance of benefits under the modified contract, Plaintiffs consciously and affirmatively acted upon and recognized the validity of the "coerced" modification by suing thereon long after the alleged coercion or duress was of necessity at an end and long before this lawsuit was filed.

Petitioner respectfully submits that this conduct constitutes ratification as a matter of law and that the complete failure of the Court of Appeals to take cognizance of these facts and the law of ratification has resulted not only in a denial to Petitioner of a substantial defense but also a decision clearly in conflict with prior decisions

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[2] No commissions were involved in the original contract.

of this Court, other Circuits and the Supreme Court of the State of Illinois. By its decision, the Court of Appeals has so departed from the accepted and usual course of judicial proceedings that the exercise of this Court's power of supervision is clearly required.

II. By holding that Petitioner's "threat" to take a legal step constitutes "coercion", the Court of Appeals for the Seventh Circuit has deprived Petitioner of a fundamental and heretofore legal right to bargain for the price it wishes to pay for merchandise, rendered a decision in conflict with the decisions of another court of appeals, decided an important question in a way conflicting with applicable state law and so departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

The decision of the Court of Appeals holding that the modification was obtained through economic coercion or duress is likewise in conflict with the decisions of this Court, the courts of other Circuits and its far-reaching effects call for intervention by this Court.

A necessary element of a cause of action predicated upon economic coercion is that the threatened acts be illegal. Coercion or duress simply cannot result from the threat to do an act which, if done, would be legal and proper. *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 245 F. Supp. 889 (N.D. Ill., 1965).

Here Sears threatened to do nothing illegal. It simply decided that it did not want to pay the prices for lockers that Hannigan wanted to charge and that it wanted to buy both lockers and buildings from a single source. Since it was not contractually bound to buy lockers from Hannigan or buildings from Fabricated it could have simply purchased both products elsewhere—as the Court of Ap-

peals found it would have done—had Hannigan not agreed to the amendment. If Sears had merely exercised this undeniable right and purchased both products elsewhere, Fabricated and Hannigan would have gone out of business, neither would have received the profits they did receive during the period Sears purchased directly from Fabricated (relying upon Hannigan's agreed modification) and neither would have had a cause of action against Sears. The identical result would also have obtained had Hannigan refused rather than agreed to modify his contract with Fabricated.

By its decision the Court of Appeals has condemned Sears because it did not simply walk away from Fabricated but rather offered to bargain with it so Fabricated might retain the business. It has condemned Sears because Sears announced it proposed (threatened) to do that which it had a perfect legal right to do. And Sears has been held liable not because of any illegal act on its part, but because Hannigan, when he learned that Sears proposed to do what it had a perfect legal right to do, *agreed* rather than refused to agree to the modification so that he could obtain commissions on sales to Sears. Since it is uncontroverted that the modification resulted from Sears' "threat" to do that which it had a perfect legal right to do it cannot be said that the modification resulted from coercion.

The holding of the court below to the contrary not only contravenes established law but it has the effect of depriving Sears of both its fundamental right to bargain and its right to rely upon a contract modification resulting from a "threat" to exercise a legal right. Under the rationale of this holding, if a potential supplier offers or Sears learns of a better price or better terms than those

being offered by a supplier whose relationship with Sears is limited because of a contract with another, Sears has no choice but to walk away from the non-competitive existing supplier. It cannot offer the existing supplier an opportunity to modify its third party contract and bargain with Sears to keep Sears' business for if the supplier and third party did modify that contract, Sears, under the view of the Court of Appeals would have been guilty of "coercion".

And there is still another reason why it cannot be said that the modification was obtained by coercion. To sustain a claim of economic coercion requires proof, not present here, that the person allegedly coerced was without an option or choice because the probable consequence of the threat would leave the person without an adequate remedy in the courts.

Thus, in *Hartsville Oil Mill* v. *United States,* 271 U.S. 43, 70 L.Ed. 822 (1925), plaintiff claimed that it had entered a contract with the United States government, that the government notified plaintiff that unless it accepted a modification of the contract unfavorable to plaintiff within one hour, the government would refuse to perform any part of the contract, and that a complete refusal of the government to carry out the contract would have resulted in a great economic loss to plaintiff. Plaintiff brought suit upon the initial contract, claiming the modification was invalid because it was made under economic duress. In affirming the lower court's decision that the original contract had been validly modified, this Court stated:

> ". . . *a threat to break a contract does not in itself constitute duress.* Before the coercive effect of the threatened action can be inferred, *there must be evidence of some probable consequences of it to per-*

son or property for which the remedy afforded by the courts is inadequate. . . ." (271 U.S. at p. 49; emphasis supplied)

In the Illinois Supreme Court case of *Illinois Merchants Trust Co.* v. *Harvey,* 335 Ill. 284 (1929), defendant, plaintiffs' landlord, demanded that plaintiffs pay her income tax on the rent and threatened to cancel the lease if the tax was not paid. Plaintiffs paid the money "under protest" and sued for its return, asserting duress. The Supreme Court affirmed the trial court's directed verdict for defendant, *even though the demand was admitted by defendant to have been wrongful,* on the ground that plaintiffs there, like plaintiffs here, had an adequate legal remedy and that the payment had, therefore, not been made under duress.

In *Joyce* v. *Year Investments, Inc.,* 45 Ill. App. 2d 310 (1st Dist., 1964), plaintiffs sued to avoid an executed settlement agreement which they had entered into with defendants. Plaintiffs claimed that they were forced to enter the settlement agreement because of defendants' economic coercion and pressure which deprived them of their free choice. Plaintiffs alleged, *inter alia,* that defendants, knowing of plaintiffs' dire financial plight, withheld certain mortgage loans which they had previously agreed to transfer to plaintiffs, that defendants knew the loans were needed by plaintiffs to continue in business, and that defendants demanded that plaintiffs execute the settlement agreement in question before the loans would be transferred. In affirming the trial court's dismissal of the complaint, the Illinois Appellate Court stated:

"'[T]he real and ultimate fact to be determined in every case is whether or not the party really had a choice—whether he had his freedom of exercising his will.' 5 Williston, Contracts (Rev. Ed. 1937) §1603.

The legal conception of economic or compulsory duress is in forcing a person to act against his own will. It does not exist when the person upon whom it has been so charged had an option or choice as to whether he will do the thing or perform the act said to have been done under duress. . . ." (45 Ill. App. 2d at p. 314, emphasis supplied)

and

"*In the case at bar . . . the plaintiffs choose to enter into an agreement with the defendants in which the defendants' allegedly arbitrary demands were met; but here the plaintiffs not only entered into the agreement, but accepted the benefits thereof.* They argue that the only course open to them was to enter into the settlement agreement and litigate later. We do not agree." (Ibid, at p. 315, emphasis supplied)

In *Vines* v. *General Outdoor Advertising Co., Inc.*, 171 F. 2d 487 (2nd Cir., 1948), plaintiff brought suit on a *quantum meruit* theory for services performed for the benefit of defendant. Defendant raised as a defense a contract between the parties. Plaintiff asserted that the contract had been obtained by duress since defendant had threatened that if plaintiff would not sign that contract, defendant would not pay plaintiff moneys allegedly earned for prior services. In affirming the lower court's dismissal of the complaint, Judge Learned Hand held

". . . it is certainly the law in New York, and probably elsewhere, that, *if an obligee had adequate legal remedies, the obligor's threat to repudiate the debt, unless the obligee will enter into the contract, will not 'without more' avoid it. This is also the law in the federal courts.*" (171 F. 2d at p. 490, emphasis supplied)

And in the recent case of *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 245 F. Supp. 889 (N.D. Ill.,

1965), the Court succinctly summarized the requirements necessary to establish a claim of economic coercion:

> ". . . (1) the coerced party was deprived of its free will; (2) it had no available alternative course of action; (3) the threatened consequences were such that the remedy at law was insufficient; (4) the threatened acts were illegal; and (5) the coercion was exercised by the party against whom the defense [claim] is asserted. (6) In addition, the party asserting the defense [claim] must have promptly disavowed the involuntary acts or acquiescence will be implied as a matter of law." (245 F. Supp. at p. 894)

Plaintiffs here were not without a choice. Hannigan had an exclusive contract with Fabricated. When he was asked to modify that contract to permit direct sales of lockers to Sears he could have agreed—as he did—thus assuring himself of the commissions payable under the modification—or he could have refused. If he had refused and if Sears had gone elsewhere to purchase both the buildings and lockers as the Court of Appeals found it would have done, Hannigan would have been without the commissions he received under the modified agreement and Sears would have been guilty of no wrong for it had no contracts with and no obligation to buy from Hannigan, Tru-Han or Fabricated. If on the other hand he had refused and Sears nevertheless bought lockers from Fabricated, Hannigan would have had a cause of action against Sears for knowingly inducing a breach of his exclusive contract. Thus indeed Hannigan had a choice and a remedy if he had refused to agree to the modification and Sears had engaged in wrongful conduct.

By its Opinion, the Court of Appeals has placed Sears and every other businessman in a position where he can

deal only at his peril when one has agreed to a contract modification. It has made it possible for Hannigan to have his cake and eat it too—even to obtain a premium for agreeing rather than refusing to agree to the modification. Under the lower court's view, he who has agreed to a contract modification can sit back for almost five years, accept the benefits of the modification, even predicate a suit upon it and then recover *profits he would not have made if he had refused rather than agreed to the modification.*

The decision below is unprecedented, without authority and Petitioner submits that its far-reaching implications on the business community call for the intervention of this Court.

III. The Court of Appeals improperly concluded that Federal jurisdiction lies to determine the merits of Plaintiffs' claim.

Plaintiffs and Petitioner (defendant) are citizens of Illinois within the meaning of 28 U.S.C.A. §1332. Hence the trial court's jurisdiction to adjudicate the common law claim of inducement to breach, upon which the judgment was entered, rested solely upon "pendent jurisdiction" resulting from its asserted jurisdiction to hear the anti-trust charges. But the anti-trust charges were so frivolous that they were perfunctorily dismissed without argument by the trial court at the close of plaintiffs' case:

> "The Court: Is there a motion to strike the first three counts?
>
> Mr. Weitzenfeld: Yes.
>
> The Court: A finding for the defendant on the first three counts?

Although lack of jurisdiction may be raised at any time Petitioner did not "sit back" to observe the outcome

of the case before raising the point. Lack of jurisdiction to hear Counts IV and V (the inducement to breach counts) was raised by defendant in its Answer (26), reiterated at the trial (228) and argued in the Court of Appeals.

All of the anti-trust claims stemmed from the charge that Sears induced Fabricated to breach its contract to sell lockers exclusively to Tru-Han and thereafter bought such lockers directly from Fabricated who paid Plaintiffs a commission on such sales. (10-16) These facts, plaintiffs claimed in Count I, gave rise to a violation of Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act which prohibits the payments of an allowance or discount in lieu of a commission or brokerage fee.[3] The obvious point of inquiry as to whether anything was paid in lieu of brokerage or commission is that period *prior* to the time Sears purchased lockers directly from Fabricated. But there were no commission or brokerage fees involved during that period. During that period Tru-Han was a buyer and Fabricated a seller (100, 104, 114-6, 157, 231). Commissions arose for the first time under the modification to the agreement and these were paid *by Fabricated to Tru-Han.* That *Tru-Han* subsequently received commissions on sales made by Fabricated to Sears could not convert the prior relationship between Fabricated and Tru-Han from buyer and seller to one of principal and agent or seller and broker. Accordingly, it is transparently clear that the facts could never support

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[3] "(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, . . ."

a violation of Section 2(c)—the brokerage section of the Robinson-Patman Act—and Hannigan, a lawyer, and the lawyers representing plaintiffs knew this at the time suit was filed.

They also knew that the facts could not conceivably support a violation of Section 2(f)[4] of the Clayton Act, as amended by the Robinson-Patman Act, the charge set forth in Count II. Section 2(f) prohibits a buyer from knowingly inducing or receiving a discriminatory price. After Petitioner commenced buying lockers directly from Fabricated, Fabricated continued to sell lockers to Tru-Han for resale to its other customers, including the ultimate retail consumer who was also the potential customer of Sears (117, 126). But the prices which Fabricated charged Sears were higher, not lower, than those which it charged Tru-Han for the same locker (114-7, 125-6) and Hannigan knew this because Tru-Han received copies of Fabricated's invoices to Sears (113-4, 152-3). Accordingly, at the time suit was filed Hannigan and his lawyers knew that Tru-Han, not Sears, was receiving a discriminatory price from Fabricated and that the charge contained in Count II could have no possible basis in fact.

It would seem unnecessary to argue that the facts simply do not sustain a charge of conspiracy under Section 1 of the Sherman Act,[5] the charge contained in Count II of the Complaint, but if, as plaintiffs contend,

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[4] "(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

[5] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ."

the alleged inducement of Fabricated to Sears to sell directly to it in breach of its exclusive contract did constitute a violation of Section 1 of the Sherman Act, the cause of action necessarily accrued when the contract was allegedly breached in December of 1962 (Complaint, Count III, Paragraph 10;15) and was barred on its face by the statute of limitations[6] in December of 1966, long before suit was filed. (*Muskin Shoe Co.* v. *United Shoe Machinery Corp.*, 167 F. Supp. 106 (D. Md. 1958); *Rutkin* v. *Reinfeld*, 229 F. 2d 248 (2d Cir., 1956); *Crummer Co.* v. *duPont*, 223 F. 2d 238 (5th Cir., 1955); *Emich Motors Corp.* v. *General Motors Corp.*, 229 F. 2d 714 (7th Cir. 1956); *2361 State Corp.* v. *Sealy, Inc., et al.*, CCH 1967 Trade Cases (Par. 72, 063). This defense was raised by Petitioner in its answer.

It is thus patently clear that the anti-trust counts were, and were known by plaintiffs to be, frivolous when the complaint was filed, that they were filed solely for the purpose of attempting to invoke the doctrine of pendent jurisdiction and to have the federal court hear a charge that should have been heard by a state court. But federal jurisdiction cannot be obtained by sham. In *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 82 L. Ed. 845 (1937), this Court, reviewing a claim which allegedly failed to meet the good faith monetary amount necessary for diversity jurisdiction, stated:

> "In a cause instituted in the Federal court the plaintiff chooses his forum. He knows or should know whether his claim is within the statutory requirement as to amount. His good faith in choosing

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[6] "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. . . ."

> the Federal forum is open to challenge not only by resort to the face of his complaint, but by the facts disclosed at trial, and if from either source it is clear that his claim never could have amounted to the sum necessary to give jurisdiction there is no injustice in dismissing the suit." (82 L. Ed. at p. 849)

That this rationale is equally applicable to cases allegedly arising under United States Statutes is clear from the language of the District Court for the District of Minnesota:

> "It is elementary that plaintiff cannot urge relief under a federal statute, which relief under any construction of the statute or on any state of facts could not be granted, and then contend that he has raised a substantial question so as to permit a federal court to deny him relief on the federal grounds, but proceed with the action and determine the other elements of the controversy." *Lund* v. *Woodenware Workers Union*, 19 F. Supp. 607, 611 (D. Minn., 1937).

Indeed, this basic proposition of Federal law was recognized by the Seventh Circuit itself in *French* v. *Jeffries*, 149 F. 2d 555 (7th Cir., 1945), a case factually dissimilar from that at bar. In that case, the Seventh Circuit cited *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 82 L. Ed. 845 (1937) and stated:

> "Where the claim asserted by the plaintiff has no existence in point of fact and is fraudulently asserted in a complaint, such a claim is incapable of supporting the jurisdiction of the Court."

and

> "When it shall appear anytime that a suit in the district court does not really and substantially involve a dispute or controversy properly within the juris-

diction of the court, it should dismiss the case and proceed no further. It is our duty, where the district court so fails to dismiss for want of jurisdiction and proceeds to dismiss on the merits, to dismiss the case, even though the question of jurisdiction was not raised in the court below but on appeal." (pp. 557-558)

Plaintiffs' lack of good faith in choosing the Federal forum was appropriately challenged at the pleading stage, again at trial and on appeal. When the trial court dismissed the anti-trust counts, he should have dismissed the inducement to breach counts as well. His failure to do so and the failure of the Court of Appeals to reverse that ruling directly conflict with an applicable decision of this Court on an important question of Federal Jurisdiction and with the decisions of other circuits on the same matter. For this reason too, Petitioner respectfully urges that the Petition be allowed.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1968 — SEPTEMBER SESSION, 1968

No. 16934

THOMAS M. HANNIGAN and TRU-HAN CORPORATION,
Plaintiffs-Appellees,

v.

SEARS, ROEBUCK AND CO.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

APRIL 15, 1969

Before DUFFY and HASTINGS, *Senior Circuit Judges*, and FAIRCHILD, *Circuit Judge*.

HASTINGS, *Senior Circuit Judge*. Defendant, Sears, Roebuck and Co. (Sears) appeals from a judgment entered by the district court upon a jury verdict finding Sears to have wrongfully and intentionally interfered with the contractual relationship between Fabricated Products, Inc. (Fabricated) and plaintiffs Thomas M. Hannigan and the Tru-Han Corporation (Tru-Han). Upon the jury's assessment of damages, the court awarded plaintiffs $30,000 in compensatory damages and $90,000 in exemplary damages.

Defendant contends the trial court erred as a matter of law in refusing to grant its motion for a directed verdict on counts 4 and 5 of plaintiffs' complaint which alleged the wrongful interference with plaintiffs' contractual rights.[1] Further, defendant asserts error arising from the trial court's denial of its motion to set aside the verdict and to enter judgment notwithstanding the verdict, or in the alternative, to order a new trial.

In determining whether the trial court properly denied defendant's motions for a directed verdict and for a judgment n.o.v. on counts 4 and 5 of plaintiff's complaint, we apply the same standards since these motions raise similar questions. *Lambie* v. *Tibbits*, 7 Cir., 267 F. 2d 902, 903 (1959); *Shaw* v. *Edwards Hines Lumber Co.*, 7 Cir., 249 F. 2d 434, 437 (1957).

It is well established that a motion for a directed verdict or for judgment n.o.v. is properly denied where the evidence is such that reasonable men in a fair and impartial exercise of their judgment may draw different conclusions therefrom. *Valdes* v. *Karoll's, Inc.*, 7 Cir., 277 F. 2d 637, 638 (1960); *Smith* v. *J. C. Penney Company*, 7 Cir., 261 F. 2d 218, 219 (1958). Thus, the propriety of such denials turns on the determination of whether under the facts, as disclosed by the record, there was sufficient evidence to warrant the submission of the case to the trier of fact. *Gunning* v. *Cooley*, 281 U.S. 90, 92-94 (1930); *Farmers State Bank of Valparaiso* v. *Dravo Corporation*, 7 Cir., 321 F. 2d 28, 39 (1963); *Smith* v. *J. C. Penney Company, supra.* In making this determination, we are obliged to view all the evidence, together with all reasonable inference to be drawn therefrom, in the light most favorable to plaintiffs. *Gass* v. *Gamble-Skogmo, Inc.*, 7 Cir., 357 F. 2d 215, 217 (1966), *cert. denied*, 384 U.S. 943; *McKay* v. *Upson-Walton Company*, 7 Cir.,

[1] Defendant's motion for a directed verdict was granted on counts 1, 2 and 3 of plaintiffs' complaint which alleged and sought damages for various antitrust violations by defendant. The judgment entered on such directed verdict is not under review on this appeal.

317 F. 2d 826, 828 (1963); *Pinkowski* v. *Sherman Hotel*, 7 Cir., 313 F. 2d 190, 192 (1963).

Viewing the record in this light, the evidence shows that in May, 1956, plaintiff Tru-Han Corporation was organized under Illinois law by plaintiff Thomas M. Hannigan. Hannigan, a citizen of Illinois, was president of and majority stockholder in Tru-Han. Sears is a New York corporation with its principal place of business in Illinois.

It is undisputed that in 1957, Tru-Han became a distributor of metal outdoor storage buildings manufactured by Fabricated and that in 1958, Hannigan conceived of a new idea for outdoor storage, *i.e.*, an outdoor metal storage cabinet or locker. After negotiations, Hannigan and John Columbini, president of Fabricated, entered into an agreement[2] on July 17, 1958 whereby Fabricated contracted to manufacture these cabinets *exclusively* for Hannigan; in consideration thereof, Hannigan agreed to purchase all such outdoor storage cabinets from Fabricated. The contract placed no limitations on Fabricated's right to manufacture and sell its metal outdoor storage buildings, and Fabricated continued to manufacture and to sell such

[2] "AGREEMENT made and entered into on this 17th day of July, 1958, by and between Thomas M. Hannigan of Chicago, Illinois, called the buyer and Fabricated Products of Fenton, Michigan, hereinafter called the Seller.

"WHEREAS: The buyer has designed a modular multi-purpose metal storage cabinet made of fabricated sections approximately 32" deep, 64" long expandable ad infinitum and approximately 60" high, and is desirous of having the seller make the said cabinets for the buyer exclusively and for the seller not to engage in the sale of said cabinets and sections to any one else directly or indirectly and the seller is interested in manufacturing the said cabinets and selling them to the buyer exclusively; It is hereby understood and agreed.

"1) For and in consideration of the buyer purchasing the said cabinets for the basic price of $18.00 for the 30" x 60" x 56" high from the seller exclusively so long as the seller is able to furnish and fill orders within a reasonable time, the seller hereby agrees that it will not compete with the buyer directly or indirectly on cabinets of this nature. This is in no way to be construed to prevent the seller from selling its present line of utility buildings.

"2) For and in consideration of the seller's covenant not to compete with the buyer, the buyer agrees to purchase all of the Garden Cabinets specified above that he may use from the seller, so long as the seller can supply the buyer as stated heretofore.

"In witness whereof we have hereunto set our hands and seals this day and year first written above."

storage buildings to various customers, including defendant Sears and plaintiff Tru-Han.

Pursuant to and in accord with this contract, Hannigan through the Tru-Han Corporation, sold the Fabricated manufactured lawn lockers to its various customers, which included Sears. Sears became a customer in early 1959 and continued to purchase lawn lockers from Tru-Han until September, 1962, at which time Fabricated began to sell lockers directly to Sears and to pay Hannigan a commission of 10% on each sale.

The record reveals that in March, 1959, a buyer for Sears, Brad J. Wakeman, attempted by letter[3] to persuade Fabricated's sales manager, Robert Ross, to sell the lawn lockers directly to Sears notwithstanding its exclusive contractual commitment to Hannigan. Sears' avowed purpose for inviting Fabricated into a direct purchasing relationship was to avoid and to eliminate the profit of the middleman, Tru-Han. Respecting its contractual obligation, Fabricated declined this invitation.

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[3] "March 10, 1959
Mr. Robert W. Ross
Fabricated Products, Inc.
19962 Conant Avenue
Detroit 34, Michigan
Dear Bob:
Last week it was brought to my attention that the Tru-Han Corporation had planned on selling to Sears, Roebuck and Co. the Storage Cabinet which you advised was being made for Tru-Han only. For your information, I have to put a stop to Tru-Han selling this item to Sears, Roebuck and Co. I am not sure whether Tru-Han contacted Sears or whether someone in our building material department contacted Tru-Han. Nevertheless, he is not to sell this item to Sears, Roebuck and Co., as I am the buyer of all of this type of storage building and equipment.
I would like to know exactly how many of these Storage Cabinets Tru-Han has sold and whether or not you would be interested in selling to Sears, Roebuck and Co, direct or perhaps making a similar cabinet for Sears, Roebuck and Co. We certainly do not want to be paying Tru-Han commission for handling this item for Sears, Roebuck and Co. I also understand that this building is going to be listed in Ward's catalog.
I would appreciate a prompt reply in regard to the above.
Yours very truly,
Sears, Roebuck and Co.
B. J. Wakeman—Buyer
Farm Equipment Dept. 632
BJW/me
cc: Mr. J. Columbini"

In June, 1960, Harold Crittenden replaced Wakeman as Sears' buyer of utility buildings and lawn lockers and continued to serve in that position until June, 1962. During Crittenden's tenure as buyer for Sears, Fabricated mistakenly sent Sears a Tru-Han invoice which disclosed the basic manufacturing price Hannigan was paying to Fabricated for lawn lockers and utility buildings. This mistake enabled Sears to become aware of the difference between the manufacturing price and the price it was paying for the lawn lockers. As a result, Sears attempted without success to induce Hannigan to lower his sales price on the lockers. On failing to persuade Hannigan to reduce the price, Sears entered into an agreement with Products Engineering Manufacturing Corporation (Pemco) to produce lawn lockers.

While Pemco was able to produce a somewhat differently designed lawn locker at a lower price than plaintiffs' sales price, the Pemco relationship did not provide a satisfactory solution to Sears' problem because Pemco experienced difficulty in filling Sears' orders for lockers. Sears continued to purchase some Fabricated produced lawn lockers from plaintiffs after entering into the Pemco agreement. Pemco went out of business in the fall of 1962.

In June, 1962, John T. Mitchell replaced Crittenden as Sears' buyer of lawn lockers and utility buildings and continued in that capacity until December, 1966.

During July or August of 1962, Mitchell, in an apparent effort to meet Sears' lawn locker needs, attempted to persuade Fabricated to sell lockers directly to Sears. To perfect such an arrangement, Mitchell told Columbini, with full knowledge of Fabricated's exclusive lawn locker contract with Hannigan, that Sears "* * * wanted one supplier of the entire line [both utility buildings and lawn lockers], * * *, and if he [as president of Fabricated] couldn't supply it that way I would have to look to the other people that I was dealing with." There was also testimony Mitchell told Columbini that Fabricated

could "make more money" on the sale of the lockers by selling directly to Sears and bypassing plaintiffs.

Mitchell suggested that Columbini work out something with plaintiffs so Fabricated could serve as Sears' source for both lawn lockers and utility buildings.

At the time Mitchell advised Columbini of Sears' plan to purchase lockers and buildings from a common source, Fabricated was in large measure economically dependent upon Sears. Fabricated was selling utility buildings directly to Sears, and 60% of Fabricated's "business was devoted to Sears as a customer." Columbini told Mitchell that "* * * if we lost the Sears business [as a result of the single source plan] that we couldn't exist. We couldn't continue to make cabinets for Tru-Han or any other customer for that matter."

After talking with Mitchell and learning of Sears' common source purchasing plan, Columbini contacted Hannigan and told him that "* * * we had to make some agreement or understanding with each other with respect to selling these cabinets directly with Sears, * * * [otherwise], we would stand a chance of losing the entire line of cabinets and buildings, * * *."

Thereafter, Hannigan did submit to a new arrangement[4] under which Fabricated would sell lockers directly to

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[4] "AGREEMENT for commission compensation pertaining to sales of storage cabinets to Sears, Roebuck & Company.

"WHEREAS there is in existence a contract between Fabricated Products, Inc. and Thomas Hannigan entered into in July of 1958, pertaining to storage cabinets and it is desired by the parties to modify that contract in the following particulars only:

"For and in consideration of Thomas Hannigan consenting to modifying the terms of the said contract by allowing Fabricated Products, Inc., to sell the following model cabinets direct to Sears, Roebuck & Company at an increase of profit to Fabricated Products, Inc., Fabricated Products, Inc., agrees to pay Thomas Hannigan the sum of $3.00 on every K-5 cabinet, $4.45 on every T-6 cabinet and $6.84 on every T-10 cabinet, which sum is based on 10% of the selling price set by Thomas M. Hannigan. The said commission to be due and payable on Friday of each & every week. That is, all cabinets shipped from Monday to Saturday, Fabricated Products, Inc., agrees to pay the said commissions to Thomas M. Hannigan on the following Friday.

"This contract shall be binding upon and shall inure to the benefit of the parties hereto, their successors and assigns.

"IN WITNESS WHEREOF we have hereunto set our hands and seals this 11th day of August 1962."

Sears and Hannigan would receive a 10% commission on the sale of each such locker. Under this modified arrangement, Sears purchased lockers at a lower price, and Hannigan received significantly less on the sale of each locker.

In substance, plaintiffs alleged that Sears wrongfully and intentionally interfered with their contractual rights by inducing Fabricated to amend its contract with Hannigan and coercing Hannigan into involuntarily agreeing to such amendment.

On appeal, Sears states that, as a matter of law, the contract was not breached but rather "was modified to permit the sales of lockers by Fabricated to defendant in exchange for the payment of commissions to plaintiff Tru-Han * * *." Further, Sears contends that, as a matter of law, the modification was not obtained by coercion. We disagree.

Viewing the facts in the light most favorable to plaintiffs, we find the case was properly submitted to the jury, and the jury could reasonably have found, as it apparently did, that Sears intentionally interfered with plaintiffs' contractual rights with a resulting involuntary modification of the original contract with Fabricated. It follows that the trial court did not err in denying defendant's motions for a directed verdict and judgment notwithstanding the verdict.

Without attempting to assess the jury's reasoning in reaching its verdict, it would not be unreasonable for it to have concluded: that Sears, in an effort to obtain an adequate number of lockers at a lower price than it was paying Tru-Han, induced Fabricated to seek a modification of its contractual obligations with Hannigan; and that Sears knew Hannigan had no practical alternative but to acquiesce in the contractual modification.

It is evident that if Hannigan had refused to assent to the modification, Fabricated would have lost all of

Sears' business. Because of its economic dependency upon Sears, Fabricated would have been forced out of business leaving plaintiffs in the precarious economic position of being without their sole source of lawn lockers. Columbini's testimony accurately reveals that under the circumstances Hannigan "* * * had no choice in the matter [but to accept the modification and permit Fabricated to sell directly to Sears] * * *."

To us, there is no legally significant distinction between unabashed third party conduct which induces one party to outrightly repudiate and breach its contract with another and subtle third party conduct which achieves essentially the same result through the equally questionable means of coercing a contractual modification. Both approaches are equally tortious in nature and similarly interfere with the contractual relationships of others.

To distinguish between conduct which directly causes a breach of contract and unjustifiable coercive conduct which effects the same result *without a breach* would overly limit the significance of the tort of inducing breach of contract and invite today's superior economic forces to freely interfere with contractual relationships without fear of legal reprisal.

We are in accord with Professor Prosser's statement that this tort "* * * does not require inducement to action as a means or complete repudiation as a result." PROSSER, TORTS § 123 at 959 (3d ed. 1964).

The traditional elements of the tort of inducing breach of contract are: (1) an existing contract between the plaintiff and a third party; (2) defendant's knowledge of this contract; (3) an intentional unjustified inducement to breach the contract; (4) a subsequent breach by the third party; and (5) resulting damage to the plaintiff. *National Gas Appliance Corp.* v. *Manitowoc Company*, 7 Cir., 311 F. 2d 896, 899 at n. 5 (1962), citing *Northern Insurance Co. of New York* v. *Doctor*, 23 Ill. App. 2d 225,

161 N.E. 2d 867 (1959); *Childress* v. *Abeles*, 240 N.C. 667, 84 S.E. 2d 176, 181-182 (1954).

In the instant case, it is undeniable that there was an existing contract between Hannigan and Fabricated and that defendant Sears had knowledge of this contract. It is also true that at different times and in varying ways, Sears, for purely private business reasons, encouraged Fabricated to either breach or alter its contract with Hannigan. In its effort to induce Fabricated to sell lawn lockers directly to it, Sears threatened Fabricated with severe economic hardships and offered Fabricated greater economic opportunities. Though Sears' overtures did not cause Fabricated to outrightly repudiate and breach its contractual obligations to plaintiffs, Sears accomplished an equivalent result by economically coercing the parties into modifying their original agreement. As a result of this coercion, Hannigan suffered monetarily.

Under these circumstances, Sears could reasonably have been found to have induced a breach of contract within the true meaning of that tort by coercively interfering with Hannigan's contractual relationship with Fabricated.

We find no merit in defendant's contention that Hannigan was not a proper party plaintiff to this action. The gist of defendant's argument revolves around the reasoning that the exclusive contract with Fabricated was made for the benefit of Tru-Han and therefore only Tru-Han could maintain an action on such contract.

A cursory review of the agreement in question reveals that the Tru-Han Corporation is not named in the contract and that the document was executed by Hannigan, individually. Further, the 1962 amendment to this contract was executed by Hannigan, makes no reference to Tru-Han and provides that the 10% commissions were to be paid directly to Hannigan. This is indicative of the fact that both the original contract and its subsequent modification were intended primarily for the benefit of Hannigan.

Defendant's reliance on the Indiana case of *Speedway Realty Co.* v. *Grasshoff Realty Corp.*, 8 Ind. Dec. 401, 216 N.E. 2d 845 (1966), is misplaced. *Speedway* is readily distinguishable from the instant case.

In *Speedway*, the court held that under Indiana law a shareholder of a corporation had no standing to sue on lease negotiations he had made on behalf of a corporation yet to be formed and which when formed adopted and ratified the acts of the corporate promoter. The court held that under these circumstances the corporation, and not the shareholder-promoter, was the real party in interest to actions arising out of such negotiations.

In the instant case, the suit did not arise out of the negotiations of a corporate-promoter but rather arose out of a contract executed subsequent to the formation of a corporation. As noted, the contract was executed by the corporation's principle shareholder as an individual and made primarily for his benefit. The agreement made no reference to Tru-Han. From these facts, it may be concluded that the individual was a primary party in interest.

In essence, the distinction between *Speedway* and this case rests in the intention of the parties. In *Speedway*, the shareholder intended that his activities as a promoter were to benefit a prospective corporation; here the evidence is abundantly clear that plaintiff acted in an individual capacity for purpose of his personal economic benefit.

At the close of all evidence, the trial court granted leave to plaintiff Hannigan to amend counts 4 and 5 of his complaint to include Tru-Han as a party-plaintiff. Defendant contends the trial court erred in granting this leave to amend. Defendant asserts that under Illinois law Tru-Han had no standing to sue due to its failure to timely pay state franchise taxes and the running of the state's applicable statute of limitations.

Assuming *arguendo,* without deciding, that Tru-Han did not have standing and that the trial court erred in granting leave to amend, we find the error to be harmless under the posture of this case. The supposed error did not adversely affect or substantially prejudice defendant in its presentation of the case. Further, the claimed misjoinder of Tru-Han could not have had a prejudicial bearing or affect on the jury's verdict or its assessment of damages. The claimed error did not affect defendant's substantial rights. *Keaton* v. *Atchison, Topeka and Santa Fe Railroad Company,* 7 Cir., 321 F. 2d 317, 319 (1963); *Delaney* v. *International Harvester Co.,* 7 Cir., 261 F. 2d 150 (1958). Fed. Rules Civ. Pro. Rule 61, 28 U.S.C.A.[5]

Defendant also contends the trial court erred in admitting into evidence over objection the testimony of plaintiff Hannigan relating to a telephone conversation he had with Columbini. Defendant urges this testimony was self-serving hearsay and improperly impeached plaintiff's own witness, Columbini. Examination of Hannigan's testimony shows that it is substantially in accord with Columbini's testimony, and any variance did not approach impeachment. Again, assuming the admission of Hannigan's testimony was improper, it was harmless. Where testimony is improperly admitted but, "* * * was merely cumulative on matters which were clearly shown by other admissible evidence [then] * * * the admission of [such] * * * testimony was harmless." *American Motorists Insurance Company* v. *Landes,* 5 Cir., 252 F. 2d 751, 753 (1958); *Gerhart* v. *Henry Disston and Sons, Inc.,* 3 Cir., 290 F. 2d 778 (1961). In the instant case, Hannigan's testimony was merely cumulative in character.

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[5] "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Defendant contends that the jury's assessment of actual damages was based on speculation and conjecture and is therefore invalid. Defendant also asserts the trial court improperly permitted the jury to assess exemplary damages.

The thrust of defendant's argument with respect to actual damages turns on the alleged failure of plaintiffs to adduce evidence from which the net profits on the sale of the lawn lockers to defendant could reasonably be calculated. Defendant argues that the trial court erred in submitting the question of actual damages to the jury because the general law and law of Illinois require that before a jury may assess damages for lost profits plaintiff must introduce evidence of net profits, *i.e.*, "gross profits and those items of expense such as rent, depreciation, telephone, salaries, etc., * * *."

Evidence introduced shows that total direct sales of lockers to defendant by Fabricated subsequent to the modification of the Hannigan-Fabricated agreement amounted to $213,355 upon which Hannigan received a 10% commission of $21,335. Had the original agreement not been modified and had Tru-Han continued to sell lockers directly to defendant, Hannigan's gross profit would have been $60,742; the total sales price would have been $236,772, with cost of goods sold being $176,030. The claimed loss in gross profits due to the modification was computed at $39,408. The jury assessed actual damages at $30,000.

Under controlling law, it is clear damages may not be uncertain, remote or speculative. However, it is equally true that the requirement of certainty does not necessitate mathematical precision in fixing the amount of damages nor does it permit defendant to complain of the resulting uncertainty where his wrongdoing caused the difficulty in ascertaining the precise extent of actual damages; only a reasonable basis of computation is required for the submission of the question of damages to

the jury. *Eastman Co.* v. *Southern Photo Co.*, 273 U.S. 359, 376-379 (1927). See 15 I.L.P. *Damages* §§ 14-15 (1968).

Where lost profits are sought as damages, the assessed damages are to be based on net profits, or a reasonable approximation thereof, and not on gross profits. Net profits constitute the difference between gross profits and the expense of operating the business. *Eastman Co.* v. *Southern Photo Co., supra; Henry's Drive-In, Inc.* v. *Anderson*, 37 Ill. App. 2d 113, 125-127, 185 N.E. 2d 103, 108-109 (1962).

Hannigan was in the brokerage business and was not engaged in manufacturing. He had customers other than Sears. The incidental costs of doing business with Sears would have been minimal at best. The jury in assessing actual damages reduced the claimed loss of $39,408 to the sum of $30,000. Under the record here, it is evident to us that such a reduction of $9,408 more than adequately covers any costs which Hannigan would have incurred as a direct result of handling this business under the terms of the original contract. We find and hold that the trial court did not err in submitting this question to the jury and that the award by the jury should stand.

On the question of punitive damages, we find that under the facts and circumstances of this case such damages were properly assessed and awarded. It is an accepted proposition under Illinois law that where the "• • • wrongful act complained of is characterized by wantonness, malice, oppression or circumstances of aggravation", then punitive damages are within the discretion of the jury and trial court. Such damages are utilized to punish the wrongdoer and to deter the wrongdoer and others from repeating the wrongful conduct. *Eshelman* v. *Rawalt*, 298 Ill. 192, 197, 131 N.E. 675, 677 (1921); *Bucher* v. *Krause*, 7 Cir., 200 F. 2d 576, 587-588 (1952), *cert. denied*, 345 U.S. 997. See also 15 I.L.P. *Damages* §§ 131-133 (1968).

We are satisfied that the defendant's intentionally coercive and oppressive conduct warranted the assessment of exemplary damages in the instant case. The fact that the exemplary damages are three times actual damages is of no significance, since it is well-settled that punitive damages need not bear a proportional relationship to actual damages. *Gass* v. *Gamble-Skogmo, Inc.*, 7 Cir., 357 F. 2d 215, 220-221 (1966), *cert. denied*, 384 U.S. 943; *Bucher* v. *Krause, supra.*

Finally, we are not persuaded the trial court erred in refusing to dismiss the suit for want of jurisdiction following dismissal of the antitrust counts.

For the foregoing reasons, the judgment appealed from is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

June 4, 1969

Before

Hon. F. Ryan Duffy, Senior Circuit Judge

Hon. John S. Hastings, Senior Circuit Judge

Hon. Thomas E. Fairchild, Circuit Judge

Thomas M. Hannigan and Tru-Han Corporation,
Plaintiffs-Appellees,
vs.
Sears, Roebuck and Co.,
Defendant-Appellant.

No. 16934

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the petition of the defendant-appellant, Sears, Roebuck and Co., for a rehearing *en banc* in the above entitled appeal, and no member of the panel and no Judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and all members of the panel having voted to deny a rehearing,

It Is Ordered that the petition of the defendant-appellant for a rehearing in the above entitled appeal be, and the same is, hereby denied.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 4 1969
JOHN F. DAVIS, CLERK

No. 438

In the
Supreme Court of the United States
OCTOBER TERM, 1969

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

THOMAS M. HANNIGAN and
TRU-HAN CORPORATION,

Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I.

THIS COURT SHOULD NOT GRANT CERTIORARI WHERE A JURY QUESTION WAS PRESENTED, DECIDED AND AFFIRMED.

This Court should not grant Certiorari where a jury question was presented, decided and affirmed.

This case involves a tort action by a Sears' supplier (Hannigan) for interference with the Sears' supplier's contract with its manufacturer (Fabricated Products). The case was tried to a jury under appropriate instructions (about which Sears has never complained) and the

jury returned a verdict in favor of the plaintiffs. The Court of Appeals Seventh Circuit affirmed the jury verdict. The facts clearly presented a question of fact which was properly decided by the jury.

All of the arguments which Sears has made in its Petition for Certiorari were made to and rejected by the jury, the trial court and the Circuit Court of Appeals, Seventh Circuit.

Throughout these proceedings Sears has conceded that it intentionally interfered with the contractual relationship between Hannigan (the Sears' supplier) and Fabricated Products (Hannigan's manufacturer). To avoid liability Sears has argued to the jury, to the Court of Appeals and now again in this Court that it is not liable for its intentional misconduct because Hannigan consented to the Fabricated breach (Pet. for Cert. 7-14) and secondly that the new arrangement was valid because it did not result from economic coercion by Sears (Pet. for Cert. 14-20).

While it is true that Hannigan and Fabricated Products continued to do business after Sears threatened to remove all of its business from Fabricated Products, (a small Sears' supplier, 60% of whose total business was dependent on Sears), the fact is that Sears through Fabricated Products forced Hannigan into the new arrangement. It is well established that the question of whether an agreement resulted from economic duress or coercion is a question of fact for the jury to decide. *Slade* v. *Slade* (1941, 1st Dist.) 310 Ill. App. 82; *Rees* v. *Schmits* (1911, 3rd Dist.) 164 Ill. App. 250, 257 (Illinois law applies).

Furthermore, the jury was specifically instructed on this issue. These instructions, which were not urged by

Sears as error in the trial court or Court of Appeals, were as follows:

> "You are further instructed that a contract may be amended or modified by the parties thereto. If you find from the evidence and under the law that a contract existed between the plaintiff and Fabricated Products under which Fabricated Products agreed to manufacture and sell lawn lockers or storage cabinets exclusively to plaintiff, but that subsequent to the making of that contract the plaintiff and Fabricated Products *voluntarily* amended said contract to permit the sale of lawn lockers directly by Fabricated to Sears, then there is no breach of contract under those circumstances.
>
> "You are further instructed that if one who is a party to a contract receives a demand from the other party thereto to alter or amend said contract, he may elect to stand on the contract as originally drawn or he may agree to the request or the demand, and that *if such party voluntarily* agrees to the request or demand, he is bound by the provisions of the agreement as amended or changed." (A. 35) (Emphasis supplied)

Where the facts showed that Sears intentionally urged Fabricated Products to breach its contract with Hannigan in order to sell Sears the product at a lower price, where Sears threatened to withdraw all of its business from the manufacturer (which business included items in addition to the lawn locker sold by Hannigan) and where the threat, if carried out would have put both Hannigan and Fabricated Products, the manufacturer, out of all business—not only lawn lockers, the jury certainly had a right to decide that the new arrangement was not voluntary.

II.

SEARS HAS NOT BEEN DEPRIVED OF ANY LEGAL RIGHT TO BARGAIN FOR A PRICE IT WISHES TO PAY FOR MERCHANDISE. ALL THIS CASE DECIDED WAS THAT SEARS DID NOT HAVE THE RIGHT TO INTERFERE WITH PLAINTIFF'S FREEDOM TO CONTRACT WITH OTHERS.

This case does not involve Sears' right to purchase lawn lockers at the lowest possible price. If Sears did not want to buy Hannigan lawn lockers (at the same price charged by Hannigan to everyone else, including Wards and Spiegels) it had every right not to buy. However, Sears wanted to buy, but at a lower price to get a price advantage on its competitors. Unable to fulfill its needs from others, it elected to obtain a price advantage by compelling the manufacturer to breach its contract with the lawn locker designer, Hannigan.

When Sears told Fabricated Products that it would refuse to buy any products (not only lawn lockers) from the manufacturer, Sears knew that the manufacturer could not commit economic suicide. Sears' conduct in this respect was unconscionable, as the jury found. A clear fact question was presented which requires no interference by this Court.

III.

A CHOICE TO GO OUT OF BUSINESS IS NOT A CHOICE.

Sears also contends that the agreement was not coerced because Hannigan had a choice. The facts showed and the jury found that Hannigan did not have a choice. Hannigan's choices were to stay with Fabricated Products or go out of business. Hannigan could not switch manufacturers since any delay in supplying his customers

would have caused Hannigan customers to seek other sources of supply. Accordingly, once Fabricated Products went out of business, Hannigan was out of business. Certainly, Hannigan's submission under these circumstances, as the jury found, was not voluntary. Conduct under duress always involves a choice, but in the eyes of the law where the choice results from another's will, it is not a choice. (*People ex rel.* v. *Hamm Drayage Co.* (1959), 17 Ill. 2d 214, 219; *People ex rel. Carpentier* v. *Treloar Trucking Co.* (1958), 13 Ill. 2d 596.) This case involves business standards which are ideally suited to be judged by a jury. All of Sears' arguments were rejected by the jury, the trial court and the Court of Appeals. These arguments should also be rejected by this Court and the Petition for Certiorari should be denied.

IV.

THE UNITED STATES DISTRICT COURT HAD JURISDICTION.

The law of pendent jurisdiction was clearly applicable in this case. The rule as to when a federal court has pendent jurisdiction is stated in *Levering & Garrigues Co.* v. *Morrin* (1933), 289 U.S. 103, 105-106:

> "*The question of jurisdiction as thus limited is to be determined by the allegations of the bill, and not upon the facts as they may turn out or by a decision on the merits.* Whether an objection that a bill or a complaint fails to state a case under a federal statute raises a question of jurisdiction or of merits is to be determined by the application of a well settled rule. If the bill or the complaint sets forth a substantial claim, a case is presented within the federal jurisdiction, however, the court, upon consideration, may decide as to the legal sufficiency of the facts alleged to support the claim. But *jurisdiction,*

as distinguished, from merits, is wanting where the claim set forth in the pleading is plainly unsubstantial.

And, as made clear in *Strachman* v. *Palmer* (1940, CA 1) 177 F. 2d 427, 429, the fact that the proof does not support the allegations of the complaint does not mean that there is no jurisdiction: . . .

> "The district court had jurisdiction by virtue of the existence of a substantial federal question. 'Jurisdiction is the power to decide a justifiable controversy, and includes questions of law as well as of fact. A complaint, setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the court as a federal court, and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way upon either question is predicated upon the existence of jurisdiction, not upon the absence of it. *Jurisdiction, as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous, or, in other words, is plainly without color or merit. . . .*'" (Emphasis supplied)

The majority of the facts involved in the violations in the instant case were possessed by persons who were strangers to the plaintiff, *i.e.*, Sears and Fabricated Products. Because the plaintiffs did not know what the facts would ultimately show, the complaint contained 5 alternative counts. The first 3 counts charged violations of the anti-trust laws. (A. 10-16). Sears admitted the sufficiency of the complaint by filing an answer on May 10, 1967. (A. 2). As an affirmative defense, lack of jurisdic-

tion was alleged by Sears. (A. 2, 26). The plaintiffs on May 29, 1967, aware of a possible statute of limitations problem as of December, 1967 (A. 156), filed a motion to strike the affirmative defenses (A. 2) which was taken by the trial court on briefs on June 15, 1967. (A. 2).

Sears apparently was well aware of the statute of limitations problem, because instead of vigorously pressing its affirmative defenses, Sears stated in its brief in opposition to the plaintiffs' motion to strike the affirmative defenses as follows:

> "* * * the validity of the position of the parties on this issue can be determined only after the facts are developed and plaintiffs are therefore again premature in seeking to have defendant's assertion as to lack of jurisdiction stricken (R. 98) * * *."

Thus, Sears recognized in its brief that: 1) Counts I, II, and III stated valid causes of action and; 2) whether recovery could be obtained under these counts depended upon the facts.

Sears' knowledge of the facts was equal to, if not greater than, the knowledge of these plaintiffs. Hannigan was not present during Mitchell's (Sears) conversations with Columbini (Fabricated Products) demanding that Fabricated Products breach its contract. In the Court of Appeals, Sears argued that the plaintiffs had knowledge of all of the facts at the time of filing suit which would have defeated the anti-trust claim, although Sears argued in the trial court in opposition to plaintiffs' motion to strike Sears' affirmative defense of lack of jurisdiction, that the facts were not sufficiently developed to determine the validity of the anti-trust counts.

Significantly, Sears did not press its contention that the trial court lacked jurisdiction until after the plaintiffs'

evidence was concluded, after the anti-trust counts were dismissed and after the statute of limitations had expired in December 1967. (A. 228).

As Judge Magruder stated in *Strachman* v. *Palmer*, (1949, CA 1) 177 F2d 427, 433:

> "However, the defendants did not move to dismiss and as the district court pointed out, by the implied consent of the parties [82 F. Supp. 165] 'testimony was received and arguments were made not only on the issue whether plaintiff could recover under the Interstate Commerce Act but also on the issue whether he could recover at common law if the Act did not apply.' Under these circumstances, defendants are not hardly in a position to urge that the complaint should have been dismissed in its entirety, without adjudication of the non-federal issues."

Also see: *Telechron, Inc.* v. *Parissi,* 197 F 2d 757, 763, (2d Cir. 1952) in which it was stated:

> "Under the circumstances [dismissal not coming until evidence had been heard] it would seem to conserve judicial effort and save expense to the parties to dispose of the entire controversy in the federal court rather than to send the non-patent claims to the state court where the same evidence would again have to be presented."

Similarly, in the case at bar, Sears' motion, after all the plaintiffs' evidence had been concluded, did not deprive the District Court of jurisdiction.

CONCLUSION

Sears' tactics in this petition are unchanged from its tactics in the trial court and in the Circuit Court of Appeals. Although Sears has never denied that it intentionally interfered with the contract entered into between Hannigan and Fabricated Products, it has sought to raise every possible ground to avoid its misconduct.

The jury, the trial court and the Court of Appeals have refused to permit Sears' intentional conduct or to accept its excuses. There is no reason for this Court, to add this business tort case to its heavy judicial load. It is, therefore, respectfully submitted that the Petition for Certiorari be denied.

Respectfully submitted,

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